Supreme Court, U.S.
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No. 91-1209

In The

Supreme Court of the United States

October Term, 1991

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION,

Petitioners,

v.

OLIVER J. FOUST

and

MANUEL LUJAN, JR., Secretary of the Interior,

Respondents.

Opposition of Oliver J. Foust to a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF OLIVER J. FOUST

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QUESTIONS PRESENTED FOR REVIEW

I. THE LEGAL QUESTIONS PRESENTED WERE NOT PRESERVED OR PURSUED BY THE TRIBES BELOW.

II. THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUES.

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BRIEF IN OPPOSITION OF OLIVER J. FOUST

The respondent, Oliver J. Foust, respectfully files his opposition to the Petition for Writ of Certiorari in this case.

STATEMENT OF THE CASE

A. PROCEDURAL POSTURE.

This petition is brought by the Arapahoe and Shoshone Indian Tribes ("Tribes") from the decision of the Tenth Circuit Court of Appeals. Mandate was issued to the District Court which has subsequently entered its Order and Judgment reinstating the original 1985 decision of the Wyoming State BLM Director as the proper and final disposition of this dispute. The District Court's Order is attached hereto at p. 1a. The State BLM Director's decision is at 53a of the Tribes' Appendices.

The BLM State Director's decision calls for the correction of the conveyance errors found in the original patents issued to respondent, Oliver J. Foust's ("Foust"), predecessor in interest in 1936. Under the BLM decision, the Tribes are to receive an equal amount of land returned from Foust in exchange for the corrected patents.

The respondent, Manual Lujan, Jr., Secretary of the Interior, has not joined in the Tribes' petition. The United States has accepted the decision of the Court of Appeals as a fair and equitable result to end this dispute.

A misstatement of the record does appear in the Tribes' petition on page 8. The Interior Board of Land Appeals ("IBLA") never did order or conduct a full hearing on the Tribes' appeal.

B. THE HISTORY OF THE PATENTS AND PARTIES.

This case is a private dispute between the Tribes and Foust over specific parcels of land concerning whether or not the erroneously conveyed patents in 1936 should be corrected by the Secretary of the Interior.

A full and concise history of the lands involved was

prepared by the Wyoming State BLM Director.[1] The chronologies and events contained therein are not in dispute. This land report is attached for the Court's convenience at p. 2a of this respondent's Appendices. This case is primarily a factual rather than a legal dispute. The facts relevant to this opposition, as developed in the administrative record by respondent Foust, are briefly summarized as follows:

1. The lands involved in this dispute are located within an area known as the Wind River Canyon in west central Wyoming. The area is on the eastern edge of the Wind River Indian Reservation. The canyon is marked by steep rocky cliffs and has within it very few places where homesteads could have been located and built. The BLM Land Report description is most appropriate:

> ... The canyon is over one-half mile deep and about one and one-half miles wide through Section 28....Topography is characterized by steep, rocky slopes and sheer cliffs. The partial survey of T. 6 N., R. 6 E., WRM, approved April 10, 1906, delineates the entire stretch of the Wind River Canyon through the township as "unsurveyable." While later surveyed in 1926 and 1927, such delineation indicated the difficulty of surveying the lands and, implicitly in locating and identifying the specific subdivisions. (Land Title Report p. 8, Appendices p. 15a.)[2]

The canyon was resurveyed by the United States in 1929. The field notes for this survey contain numerous references to inabilities to fix corners and determine bound-

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[1] The BLM conducted an extensive field examination, records and archives search and liaisoned with the BIA and all other interested parties and witnesses in making up its Land Report. This process took well over two years.

[2] The 1906 Government map of Section 28 is attached at p. 20a. Section 28 is shown to be unsurveyable.

aries in this part of the canyon. It is upon this survey that the erroneous descriptions for the patents at issue were based.[3]

2. This canyon was opened to the public for homesteading by the Tribes cessation codified in the March 3, 1905 Act, 33 Stat. 1016. The entire canyon was withdrawn as a powersite reserve subject to the restoration procedure available to any entryman under Section 24 of the Federal Power Act, 16 U.S.C. § 818. It was this canyon that attracted Byron Smith and his wife in 1929 to make their homestead.

3. Contrary to the implications in the Tribes' petition, Smith was not a squatter. He was a wounded and disabled veteran from World War I and as such had earned his homestead preferences allowed him by his military service under the law. It was a promise made to him by the United States Government.

4. Smith and his wife chose one of the few "narrow draws" in the Canyon upon which they could construct a home.

5. Smith determined that his desired homestead was located in the NE1/4SE1/4, Lots 4 and 5 of Section 28 as taken from the 1929 survey mentioned above. Applications were made for these parcels and patents were issued by the United States in 1936. Smith paid the consideration for these parcels as required by law and this money was applied to the benefit of the Tribes. Significant in this process was the restoration from the powersite reserve of Lots 4 and 5 upon routine application under the Federal Power Act.[4] On the 1929 survey are the marginal entries indicating that for every entry made into the canyon by the homesteaders, all were restored from the powersite withdrawal and patented. Also, Smith was excused from the cultivation requirements for his homestead by operation of the Act of August 19, 1935. 49 Stat. 659, as relates to disabled veterans.

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[3] The 1929 survey map for Section 28 is attached at p. 21a.

[4] The Restoration Order is attached at p. 29a.

6. Most important in this history and specifically noted by the Court of Appeals was the effect of the "on-site" inspection of the property by Max Caplan, Special Agent of the Department of the Interior on October 31, 1935. Caplan was dispatched to investigate Smith's final proof on the proposed entries. At this time, Smith's home and buildings *had been built* in the narrow draw. Special Agent Caplan inspected the proposed entry and as Smith had done, mistakenly certified on behalf of the United States that the entry *and improvements* were in fact located in the NE1/4SE1/4, Lots 4 and 5 of Section 28. Caplan's Report is attached.[5] Consequently, in 1936 the United States erroneously described the tracts it intended to convey to Smith. This mistake was mutual by Smith and the United States and was clearly established in the record.

7. All of Smith's proofs, the Affidavits of his subscribing witnesses, his descriptions of the small springs consistently and mistakenly placed the entries and improvements in the NE1/4SE1/4, Lots 4 and 5. His neighbors verified under oath that they all believed the improvements were on the lands erroneously described in the patents.[6]

8. As noted in the BLM Land Report, "the records show that Smith complied with the provisions of applicable laws to the satisfaction of officials of the Department of the Interior and was entitled to receive patents to lands he actually entered and improved."[7]

9. Smith's applications with descriptions of the entries and location of the improvements built thereon were advertised as required by law and no objections were made by Tribes or the Bureau of Indian Affairs.

10. Smith died in 1958. In 1963, Smith's widow sold the property for fair consideration to Foust and his wife by

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[5] Respondent's Appendices at p. 27a.

[6] Bonnie Bleak's Affidavit is at p. 38a. A representative testimony of witness upon final proof is at p. 22a.

[7] Land Report at p. 16a.

Warranty Deed with Abstract of Title. Both of the documents placed the lands and improvements thereon in the NE1/4SE1/4 and Lots 4 and 5 of Section 28. In 1977, Foust filed for a State of Wyoming water permit for the spring located above his home. At this time the spring was again described to be in the NE1/4SE1/4 of Section 28. The State of Wyoming likewise accepted this mistaken description as correct.

11. Sixteen years after he purchased the lands, in 1979, Foust proposed to sell the river frontage of Lot 4. The Tribes wished to purchase this property but were outbid by its current owner. Foust sold the land to a non-Indian and the seeds of this dispute were sown.[8]

12. In 1979, the Tribes then requested the BIA and the BLM to conduct, at Government expense, a modern laser survey to precisely fix the boundary lines in the canyon for the first time. The only other surveys which had ever been done of this part of the canyon were the old 1906 and 1929 Government surveys noted above.[9] This new survey, conducted with modern technology, revealed the boundary line to be a few feet South of the buildings and improvements erected some fifty years prior. The land patented to Smith was determined to be on a steep canyon slope where no homestead could have possibly been built.[10]

13. After the requested survey, the Tribes put Foust on notice of trespass. With encouragement of the BIA, the

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[8] Until this time and since 1929 some fifty years had passed and no question had been raised about any erroneously conveyed patents.

[9] The map attached to the Tribes petition at 32(a) is the 1979 replat. This precise survey did not exist in 1929.

[10] Attached is a photo taken from the record, showing how close the boundary lines in dispute are situated. This photo is worth a thousand words to show the topography and how easily this mistake in description was made by both Smith and the United States, p. 19a.

parties made attempts to settle the dispute which failed.[11] In May of 1982, Foust then made application to the BLM for a correction of conveyance under the provisions of the Federal Land Policy Management Act, 43 U.S.C., 1746 ("FLPMA"), and the Tribes intervened.

14. Notwithstanding the administrative proceedings underway, the Tribes, in December of 1982, filed an action in Federal Court to annul these patents, eject Foust and collect damages. The United States refused to join the Tribes in that case. Prior requests had been made by the Tribes for the United States to bring a trespass action against Foust. The United States refused to do so and the statute of limitations has long since expired. The Tribes' Federal lawsuit was dismissed by the District Court so as to allow the parties to pursue the administrative remedy of a corrected conveyance under FLPMA.[12]

15. In disregard of the stipulated terms of the District Court's Order dismissing the Tribes' federal lawsuit, the Tribes subsequently filed an ejectment and damage case against Foust in the Shoshone and Arapahoe Tribal Court which is still pending and which case the Tribes refuse to dismiss.[13]

C. THE PROCEEDINGS AND POSITIONS OF THE PARTIES BELOW.

In the processing of Foust's application for correction of the patents, the Tribes were allowed to intervene and present their positions and objections. In their formal opposition filed with the BLM State Director in May of 1983, the Tribes listed only four objections to the application.

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[11] Interestingly enough, the concept of a land exchange as a means of settlement of the dispute as subsequently adopted by the BLM was originally suggested by the BIA.

[12] The Stipulation for Dismissal is attached at p. 40a.

[13] Refusal to hear this petition will end the Tribal Court lawsuit which is fraught with a multitude of jurisdictional problems.

They were identified as (1) the lands in question were not subject to entry under the homestead laws (2) that a clear error must be shown in the original patent (3) that equities do not favor correction of the patent, and, (4) that Foust did not have a survey done upon his purchase of the property. None of the legal issues were raised or pursued to ruling as are now seen in this petition.

Significant when examining the legal issues raised here for the first time in this petition is the fact that at the outset, the record establishes the Tribes submitted that *the Secretary had the authority to correct the patents for these lands* under Section 316 of FLPMA "where necessary to correct error." The Tribes elected to oppose the patent correction on the facts of the case, i.e., that the factual showings and record made by Foust were not sufficient to meet the criteria of the statute. The Tribes did not pursue any legal issues of whether or not the Secretary had authority to make the corrections desired for these specific lands. None of the legal issues now raised in this petition were pursued or rulings obtained from the very outset of the Administrative proceedings.[14]

The BLM State Director did a thorough field investigation and archive search which took over two years. The site was investigated and the Tribes were asked to forward any evidence why the site had any special significance to them. None was submitted.

The BIA was likewise asked to submit any evidence showing any detriment or special significance to the Tribes that would be affected by the patent correction. None was submitted. The BIA, in fact, first suggested a land exchange as a solution to this dispute. The regional solicitor advised the BIA that based upon his personal knowledge of the canyon and this homestead, the mistaken description claim of Foust may have merit and that the Secretary could correct the errors made in the patent p. 42a.

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[14] The Tribes did assert that Department of the Interior's opening of the entire township was illegal under the 1905 Act. This rather radical approach was not however pursued.

Subsequently, the BLM State Director issued his decision approving the application for correction of conveyance. The decision found existence of a mutual and clear mistake in the original conveyances which were equally caused by Smith and the Government inspector who visited the site in 1935; that the lands proposed to be entered by Smith were equally available for entry upon restoration from the powersite withdrawal at that time; and the equities favored the Foust's position.[15] Encompassed in the decision was a requirement for Foust to reconvey to the United States an equal amount of land for the benefit of the Tribes, the lands erroneously patented.

The Tribes then appealed to the IBLA.

In its statement of reasons filed with the IBLA, the Tribes did initially raise the issue of whether or not the lands at issue were subject to the FLPMA and if the Secretary could afford the relief requested by Foust. However, this issue was not pursued below. Again, the Tribes elected to defend their position on the facts of the case and not any legal issues.[16] Significantly, *the IBLA did find that the Secretary had the authority to act as it related to these lands* under the statute if the proper factual showings were made by the record. The touchstone of the IBLA decision was that (1) no clear error in fact had been sufficiently shown to exist in the descriptions contained in the patents (2) that since the lands had been withdrawn as a powersite, they were not available for or subject to entry under any circumstances and that (3) the equities did not favor the Fousts. The IBLA reversed the State Director's decision.

Foust appealed to the District Court for the District of Wyoming. In response to this appeal, the Tribes accepted

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[15] The decision of the BLM State Director is printed at 53a of the Tribes' petition and will not be repeated here.

[16] Although the Tribes claim the IBLA held a full hearing on the Appeal, it never occurred. In an IBLA appeal, if a *significant legal* issue is presented by an appeal, it must hold a full hearing. See *Stickelman v. United States*, 563 F.2d 413 (9th Cir. 1977). It did not.

the rulings of the IBLA without objection and defended same as the proper law of case. That IBLA ruling specifically included the finding that the Secretary of the Interior could correct the errors alleged in the application for these lands if the factual requirements of the statute were met. The Tribes raised none of the legal issues now proffered in this petition. They were content to defend the IBLA decision on the facts. The legal issues raised *de novo* in this petition were waived in the District Court.

The Tribes prevailed in the District Court and Foust timely filed his appeal in the Tenth Circuit.

In the Court of Appeals, the Tribes again did not pursue the legal issues they consider now paramount to them in this petition, i.e., the ability of the Secretary to correct the patents to these lands. Throughout the appeals the Tribes accepted the IBLA ruling in this respect. Prior to their loss in the Court of Appeals on the facts of the case, the Tribes had elected to oppose only on the merits. All other legal issues were again waived in the Court of Appeals.[17]

It was only with petition for rehearing, with a suggestion of a hearing en banc, were the legal issues now asserted here first raised. The Court of Appeals was unanimous in rejecting the petition for rehearing en banc. The United States refused to join in the Tribes rehearing petition.[18]

D. MISSTATEMENTS OF THE RECORD.

This respondent perceives the following misstatements of the record and cites them as required by Rule 15:

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[17] Even the dissenting opinion in the Court of Appeals agreed that the statute gave the Secretary the power to correct these patents for these lands under the unique or specific facts of this case.

[18] The United States entered the case in defense of the IBLA decision for the first time in the District Court and did not contest the authority of the Secretary to make a correction of patents for these lands. The United States also elected to defend the IBLA decision on the facts of the case. The United States now has accepted the decision of the Court of Appeals as a fair and equitable result to end this dispute.

1. At page 4, the Tribes refer to Smith's unlawful settlement of this land. There has never been any finding of fact below that Smith's entry was unlawful. The BLM and the Court of Appeals found his entry and the mistake in the conveyance to have been made in good faith.

2. At page 4, the Tribes state that Smith proceeded to build his house and improvements after his patent applications were approved on another piece of land. The record is clear that the home and improvements had been built prior to patent and before inspection by the Government agent, Caplan, on what was believed to be a properly described entry under the 1929 survey.

3. At footnote number four of page 5, the Tribes state that no patent could have issued to Smith for the SW1/4NE1/4 because he did not apply for restoration under the Federal Power Act. Such is not the established historical record. All Smith would have had to do, had he not made the mistake in description, was to have a restoration done for the adjoining parcel, as all other tracts in the Canyon did. Then a patent would have issued for the other land.

4. At page 6 of the petition, the Tribes allude to the fact that Smith did not pay for any patent on the SW1/4 NE1/4. He did pay the Tribes for the misdescribed parcel involved in this case.

5. Also at page 6, the Tribes infer that Foust did not obtain a survey in 1963 because of the cost. The record reflects that the real reason was that he was told by the County surveyor that any routine survey in the canyon would not be accurate or reliable due to the topography p. 35a. The survey needed would be a laser type survey with helicopters as was done in 1979 by the Government as only the Government was capable of doing at that time.

6. At page 7, the Tribes assert that the record establishes that the Tribes were not told of the alleged trespass until 1979. That fact strains credibility and is not supported by the record. The record reflects knowledge by both the Tribes and the BIA of the mistakes in the survey for many years and they took no action.

7. At page 9, the Tribes claim its motion for summary judgment was granted by the District Court. Such is not the record. The District Court's Order (15a of the Petition) affirms the IBLA decision under Administrative Procedures Act. 5 U.S.C. 702 and nothing more.

8. At page 10, the Tribes reportedly refer to Smith and his wife as squatters. There are absolutely no findings below of any basis for such a claim. On the contrary, the record is uncontested that Smith was a disabled War Veteran who had earned his right to a homestead properly conveyed to him by the United States without an erroneous description and that he had acted in compliance with the laws in good faith here.

REASONS FOR DENYING THE WRIT.

The Court of Appeals decision reaches a fair and equitable resolution of this private dispute between the parties. There is no public interest involved of the type that has traditionally required this Court to intervene. The Secretary of the Interior who is charged by Congress with the dual responsibilities to protect Tribal interests and to correct errors in patents has accepted the wisdom and logic of the result obtained below and does not join in this petition.

The precedent value of the Court of Appeals decision, if any, will be limited to specific facts of this unique case brought within the very narrow confines of the patent correction mechanisms of FLPMA. There are no conflicting decisions from the Circuits that deal with correcting clear errors in patents. There are no constitutional issues claimed as well. It is highly unlikely, given the passage now of over sixty years, that a similar fact situation will ever recur.

Further, the Tribes waived the legal issues below that they now consider to be a "threat to the integrity of all withdrawn public lands." Not only did the Tribes waive those legal issues, they accepted and defended the IBLA ruling that the Secretary could correct these patents for

these lands but only if the factual requirements of the statute met. The Tribes accepted those consistent rulings below and elected to defend on the merits which they lost in the Court of Appeals.

As all the parties perceived below, this case was a factual dispute concerning the history of these very specific parcels of land. This Court is now being asked to make its own factual judgments of the sufficiency of the evidence found in the Administrative records by the Tribes' Petition. This Court has traditionally refused to intervene in this type of case and should not do so here.

I. THE LEGAL QUESTIONS PRESENTED WERE NOT PRESERVED OR PURSUED BY THE TRIBES BELOW.

The record is clear that all of the legal issues presented by the Tribes now were waived below. A vast majority of the case authorities and statutes cited in the petition have never appeared in any brief or pleading below until after the Court of Appeals decision.[19] The Tribes have taken a "shotgun" approach of cleverly inserting new legal issues in order to get the Court's attention after losing on the merits. The United States has refused to join in this exercise. In fact, not only was there a waiver, the Tribes adopted and defended the rulings they obtained in the IBLA and the District Court; These rulings clearly found that the Secretary of the Interior could correct errors in these patents for these lands. The Tribes now turn a full one hundred eighty degrees in this petition. Accordingly, this respondent will ask the Court to follow its general rule that it will not decide issues raised for the first time in this Court. *Tacon v. Arizona*, 410 U.S. 351 (1973); *New York Dock Co. v. S.S. Poznan*, 274 U.S. 117 (1927); *Adams v. Mills*, 286 U.S. 397 (1932); *Minnich v. Gardner et al.*,

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[19] For example, references to the Alaska Native Claims Settlement Act, Indian Nonintercourse Act and the Trade and Intercourse Act are new to this case.

292 U.S. 48 (1934); or where the issues were not raised in the Court of Appeals. *Adickes v. S.H. Kriss & Co.*, 398 U.S. 133 (1970).

This is not the type of exceptional case that requires the Court to review issues raised de novo. *Lawn v. United States*, 355 U.S. 339 (1958). This is a private dispute which is limited to a very specific fact situation not likely to recur. No public or constitutional issues are involved. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). The issues here are limited to the specific facts of this patent mistake and concern questions of the sufficiency of the evidence in the administrative record to meet the elements of the corrective statute.

II. THE COURT OF APPEALS CORRECTLY DECIDED THE LEGAL ISSUES.

The Court of Appeals correctly held that the 1976 Amendments to FLPMA deleted the earlier requirement of the statute that corrections to patents be based on the land's availability for entry at that time. This was the only issue of law presented to the Court of Appeals in this case upon administrative review of the IBLA decision. This lack of availability for entry argument was the very foundation of the Tribes' opposition to correction of these patents below. This was the requirement of the statute prior to the 1976 Amendment. In 1976, Congress expressly deleted that requirement from the statute. The District Court found that deletion to be ambiguous. The Court of Appeals did not. The IBLA in the two cases decided since the 1976 Amendments has recognized the Amendments as clear and explicit and held that questions of availability in the context of powersite withdrawals were no longer relevant to patent correction proceedings under the FLPMA. *Mantle Ranch Corp.*, 47 IBLA 17 (1980);[20] *Roland Oswald*, 35

[20] *Mantle* is very close to the facts of this case involving a successful patent correction in a canyon where a mistake in survey due to the topography was involved as well as a powersite reserve withdrawal.

IBLA 79 (1978). There is no conflict from other circuits nor any other reported opinion contrary to the Court of Appeals decision.

The Court of Appeals was correct in finding that these lands were subject to the patent correction mechanisms of 43 U.S.C. 1746, based upon the status of the lands at the time the errors in the conveyance were made. At that time, the Tribes had ceded these lands for sale under the homestead laws. But for the mutual mistake of the entryman and the government, the proper ceded parcel would have been sold. The Tribes have been paid and will receive here an equal land exchange. The logic of the Court of Appeals allows the corrective mechanism the FLPMA to operate here to prevent an unjust and inequitable result. The bottom line of this case is the Tribes' effort to gain a windfall in the value of the improvements made by Smith and Foust over the years and subject Foust to the extreme hardship of losing his home. The Court of Appeals understood the real motive of the Tribes' here and rejected it. The Secretary of Interior agrees with the fairness and equitable result reached by the Court of Appeals and this Court should do the same.

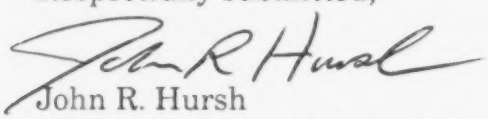
III. CONCLUSION.

Perhaps the best closing argument for Mr. Foust's opposition to this petition can be borrowed from the IBLA itself in its *Mantle*, supra, decision:

> We do not believe that after more than 40 years of paying taxes on the land, occupying it in good faith, and placing improvements thereon, a man should be deprived legal title because of this kind of technicality. This appears to us to be a case involving the kind of good faith error which Section 316 of the Federal Land Policy and Management Act of 1976 was designed and to deal with and which falls within the purview of the aforementioned Directive. 47 IBLA 17, 27.

The petition for writ of certiorari should be denied.

Respectfully submitted,



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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

OLIVER J. FOUST,	)	
	:	
Plaintiff,	)	
	:	
vs.	)	
	:	
MANUEL LUJAN, JR., Secretary of Interior,	)	88-CV-0235-K
	:	
	)	
Defendant,	:	
	)	
NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION.	:	
	)	
Intervenors.	:	

ORDER AND JUDGMENT

UPON the Order on Mandate entered by this Court and dated October 21, 1991, IT IS,

ORDERED THAT the decision of the State Director of the Bureau of Land Management for the State of Wyoming dated December 30, 1985 be reinstated as dispositive of this case. IT IS FURTHER,

ORDERED THAT the Bureau of Land Management shall proceed with the patent and title corrections as determined appropriate by the State Director of the BLM in his decision of December 30, 1985.

DONE this 18th day of November, 1991.

ENTERED
ON THE DOCKET
November 19, 1991
William C. Beaman
Clerk
by /s/ Betty Griess
Deputy Clerk

BY THE COURT:
/s/ Ewing T. Kerr
United States
District Judge

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

LAND REPORT TITLE PAGE

State: Wyoming
District: Rawlins
County: Hot Springs
Resource area: Lander (Wind River Indian Reservation)
Type of Action: Application for Correction of Conveyance Document – Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1746, 43 CFR 1865
Serial Number: C-050733 and C-051835
Applicant's name: Oliver J. and Marjorie E. Foust
Address *(include zip code)*: Box 768, Thermopolis, WY 82433
Date(s) of examination: May 5, 1983

LANDS INVOLVED

TOWNSHIP: 6 N.
RANGE: 6 E.
MERIDIAN: WIND RIVER
SECTION: 28
SUBDIVISION: (Original Survey)
Applicant's Private Lands:

	Subdivision	Acres
C-050733, Patent No. 1087000	NE1/4	40.00
C-057835, Patent No. 1087176	Lot 4	16.43
	Lot 5	47.55
	TOTAL	103.98

Tribal Lands on Wind River Indian Reservation – Occupied by Applicant:
TOWNSHIP: 6 N.
RANGE: 6 E.
MERIDIAN: Wind River
SECTION: 28

SUBDIVISION: SE1/4NE1/4 and SW1/4NE1/4 (now described as lots 9, 10, 11, and 12)
ACRES: 80.00

Purpose of report: The purpose of this report is to determine whether or not the original patent (s) conveying the land contained errors and, if so, whether or not correction of the patent(s) pursuant to Section 316 of FLMPA is warranted.
Prepared by: /s/ Jon A. Johnson
Title: Land Law Examiner
Date of report: 12-23-85

I. INTRODUCTION

Oliver J. and Marjorie E. Foust[1] filed an Application for Correction of Conveyance Document on May 3, 1982, pursuant to Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1746 (1982). The applicant is the record title owner of lots 4 and 5 and the NE1/4 SE1/4 of section 28, T. 6 N., R. 6 E., Wind River Meridian (WRM). The lands are located in Wind River Canyon within the Wind River Indian Reservation, Hot Springs County, Wyoming. (See Maps Nos. 1, 2, and 3.)

II. BACKGROUND

The Fousts acquired the above lands on June 19, 1963, by warranty deed from Evangeline Smith Meeks, widow of the original patentee, Byron H. Smith. The conveyance purportedly included a house, along with numerous other improvements, which the Fousts, upon acquisition, have occupied to the present time.

In 1968 or 1969, the Bureau of Indian Affairs (BIA) discovered that the Foust's home and other improvements were possibly in trespass on tribal lands. BIA subsequently requested survey by the Bureau of Land Management (BLM). Pursuant to Special Instructions dated August 6, 1975 and Supplemental Special Instructions dated June 14, 1979, the BLM conducted a dependent resurvey and survey of section 28, T. 6 N., R 6 E., WRM, in October and November of 1979. The plat of that resurvey and survey was approved by BLM on January 29, 1980. (See Map No. 4.)

In accordance with the special survey instructions, the S1/2NE1/4 of section 28 was subdivided into lots 9, 10, 11,

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1 Marjorie Foust died December 27, 1984.

and 12. The boundaries of lot 11 were established by BIA to include all of the Foust's improvements. (See Map No. 5.) The resurvey confirmed that the Foust's home and other improvements were located within the S1/2NE1/4 of section 28, in trespass of tribal lands, and not located on the Foust's private lands.

Following confirmation of the trespass, discussions and negotiations were conducted between the Fousts, their counselors, and tribal representatives, including tribal counsel, BIA, and BIA's Regional Solicitor. The Fousts first proposed to resolve the trespass by offering exchange of the NE1/4SE1/4 of section 28 (40 acres) for lot 11 of section 28 (9.74 acres). This offer was rejected by the tribes. They then offered to exchange lot 5 of section 28 (47.55 acres) for lots 9, 11, and 12 of section 28 (40.02 acres). That offer was also rejected by the tribes.

On March 15, 1982, the Department of the Interior Field Solicitor, Billings, Montana, wrote to the Fousts advising them that accrued damages resulting from their unauthorized occupancy from June 16, 1963, to February 15, 1980, totaled $25,000, plus an undetermined rental for 1981 and 1982. The Field Solicitor further proffered the following for discussion:

1. Payment for past rentals up to and including 1981 and 1982.

2. Execution of an easement to the Tribes to cross fee lands in lot 4, section 28, T. 6 N., R. 6 E., to obtain access to other Tribal trust lands.

3. Possibly entering into a lease by the Tribes to the lands involved in the alleged unauthorized use.

These settlement proposals were rejected by the Fousts.

With negotiations for settlement at an impasse, the Fousts

then applied to BLM for a corrective patent on May 3, 1982. They allege that the original patent was issued in error and propose a corrective patent be issued to them conveying lots 9, 11, and 12 within section 28, T. 6 N., R. 6 E., WRM, Wyoming (containing 40.02 acres). In exchange, they offer to reconvey lot 5 within section 28, T. 6 N., R. 6 E., WRM, Wyoming (containing 47.55 acres) to the United States. (See Map No. 4.)

On December 28, 1982, the Shoshone and Arapahoe Tribes filed suit against the Fousts in U.S. District Court, District of Wyoming (C82-0515). Counsel for the Fousts then filed a motion to dismiss the complaint, which Judge Kerr granted by order dated February 16, 1983.

On March 18, 1983, BLM requested the parties in interest submit information for consideration in disposition of the Foust application. On May 19, 1983, counsel for the Tribes submitted OPPOSITION OF THE SHOSHONE AND ARAPAHOE TRIBES TO THE APPLICATION TO CORRECT HOMESTEAD PATENT FILED BY OLIVER J. AND MARJORIE E. FOUST (Attachment 1); counsel for the Fousts submitted their RESPONSE OF OLIVER AND MARJORIE FOUST TO THE OPPOSITION OF THE SHOSHONE AND ARAPAHOE TRIBES (Attachment 2) on June 20, 1983; and Tribal counsel submitted their REPLY OF THE TRIBES TO THE FOUSTS' RESPONSE (Attachment 3) on July 8, 1983. These submissions are incorporated by reference in this report.

The Shoshone and Arapahoe Tribes object to approval of the Foust patent correction applications. The BIA Superintendent, Wind River Agency, and the BIA Area Director, Billings, Montana, support the Tribes' position. Counsel for the Tribes proffer four reasons for rejection of the Foust's application:

1. The land was not subject to entry under the homestead laws.

2. A clear error in the original patents was not made.

3. Equities do not favor a correction of patent.

4. Failure of the Fousts to exercise due diligence as purchasers of the lands.

BIA recommends rejection of this application because:

1. Correction of the patent would be detrimental to the Shoshone and Arapahoe Tribes.

2. It is not clear that an error in the description of the lands (Smith homesteaded) was made.

3. Support of the Tribes' position fulfills BIA's trust responsibility to the Tribes.

4. The surveys of the BLM have been relied on by numerous parties in this issue. The Tribes' rights in reliance upon these surveys have to be respected also.

III. LAND STATUS SECTION 28, T. 6 N., R. 6 E., WRM

A. History

July 3, 1868 – The Wind River Indian Reservation was established by treaty between the United States and Eastern Band of the Shoshone Tribe.

March 3, 1905 – The lands were ceded to United States pursuant to Act of March 3, 1905, 33 Stat. 1016. The lands were unsurveyed and therefore not subject to entry under the homestead laws.

February 10, 1910 – The lands were withdrawn for Temporary Power Site Withdrawal No. 115 by E. O. 2-10-1910.

July 2, 1910 – Power Site Reserve No. 115 was established by E. 0. 7-2-1910, pursuant to the Act of June 25, 1910, 36 Stat. 847. E. 0. 7-2-1910 ratified, confirmed, and continued the withdrawal created by E. 0. 2-10-1910 and included all of section 28 (unsurveyed).

November 12, 1927 – The survey plat for a portion of T. 6 N., R. 6 E., including section 28, was approved.

May 10, 1928 – Secretarial Order 5-10-1928 – Power Site Interpretation No. 115 – conformed power site withdrawal to survey. Lands in section 28 withdrawn included lots 1 through 8, SW1/4NE1/4, W1/2NW1/4 and NW1/4SW1/4.

October 5, 1928 – The Official GLO Survey Plat was filed.

December 15, 1928 – The NE1/4SE1/4 was opened to homestead entry. The five year period under Act of March 3, 1905, began.

August 29, 1930 – Lots 4 and 5 of section 28 within Power Site Reserve No. 115 were opened to entry by Restoration No. 541. The Soldier's simultaneous filing period began September 13, 1930.

August 28, 1942 – Secretarial Order 8-28-42 restored "undisposed of ceded land of the Wind River Reservation" in that portion of sec. 28, T. 6 N., R. 6 E., Wind River Meridian, lying east of the "Big Horn River" to tribal ownership. (Copies of above documents in case file.)

B. Homestead Entries C-050733 and C-051835 – Byron H. Smith

The lands owned by the Fousts were originally conveyed to Byron H. Smith by two separate patents:

1. Patent No. 1087000 for original homestead entry Cheyenne 050733 granted November 12, 1936, for the

NE1/4SE1/4 of section 28, T. 6 N., R 6 E., WRM, pursuant to R.S. 2289. No minerals were reserved.

2. Patent No. 1087176 for Stock-raising Homestead Entry Cheyenne 051835 granted November 24, 1936, for lots 4 and 5 of section 28, T. 6 N., R. 6 E., WRM, pursuant to the Act of December 29, 1916 (39 Stat. 862). All minerals were reserved to the United States.

C-050733

On December 9, 1929, Byron Smith filed Stock-raising Homestead Entry Application Cheyenne 050733 with the U.S. Land Office at Cheyenne, Wyoming, under the Act of December 29, 1916, for the NE1/4SE1/4 of section 28. The same day, the Land Office Register rejected the application stating the land was not subject to entry under the Act of March 3, 1905 Shos. On December 15, 1929, Byron Smith appealed the Register's decision correctly stating that, upon approval and filing of the survey of the lands (and issuance of the requisite opening order), they became subject to entry under the homestead laws as provided by the Act of March 3, 1905. Along with his appeal, Mr. Smith submitted Supplemental Homestead Entry C-050733 on December 15, 1929, also for the NE1/4SE1/4 of section 28, under R.S. 2289.

On July 3, 1930, the Acting Assistant Commissioner of the General Land Office advised the Register, Cheyenne Land Office, that the lands were opened to homestead entry on December 15, 1928, and returned Smith's application C-050733 for appropriate action. On July 9, 1930, Homestead Entry C-050733 was allowed under R.S. 2289.

C-051835

On September 19, 1930, Smith submitted another petition for designation for lots 4 and 5 of section 28 for an additional entry under the Stock-raising Homestead Act. Lots

4 and 5 were within Power Site Reserve No. 115 established by E.0. 7-2-1910 and had been restored to entry, subject to the provisions and reservations of Section 24 of the Federal Water Power Act (Restoration No. 541; 55724 "F" CBB of 8-29-1930). That restoration order provided for a soldier's simultaneous preference right period of filing from September 13, 1930 to October 2, 1930. Lots 4 and 5 were designated stock-raising lands on February 21, 1931, and entry Cheyenne 051835 was allowed March 16, 1931.

C. Present Status

LOT 4: Surface estate: Private. Oliver Foust. Portion west of U.S. Highway 20 conveyed to third party by Fousts
Mineral estate: Tribal owned. Restored to tribal ownership by PLO 5427 (July 23, 1974).

LOT 5: Surface estate: Private. Oliver Foust
Mineral estate: Tribal owned. Restored to tribal ownership by PLO 5427 (July 23, 1974).

Lots 4 and 5 are within Power Site Reserve No. 115.

NE1/4SE1/4: Surface and mineral estates: Oliver Foust

SE1/4NE1/4: Surface and mineral estates: Tribal owned.

SW1/4NE1/4: Surface and mineral estates: Tribal owned. Within Power Site Reserve No. 115.

IV. SITE DATA

A. Investigation

On May 5, 1983, Jon Johnson, BLM, Wyoming State Office, conducted a field investigation of the lands. The following persons accompanied the investigator:

Bob Robertson – BIA, Fort Washakie
Mr. and Mrs. Foust
Joseph Smith, Sr. – Arapahoe Business Council
Alfred Ward – Shoshone Business Council
Tom Fasse – Foust's counsel
John Hursh – Foust's counsel
Bill Thomson – Counsel, Arapahoe and Shoshone Tribes

B. Location and Identification

The Foust homestead occupies a small canyon on the east side of Wind River Canyon, within the SW1/4NE1/4 of section 28. (See photos.) All of the Fousts' improvements, including two developed springs serving the homestead, are within lot 11, created by the survey of section 28 approved January 29, 1980. (See Map No. 5.)

The lands were located using the U.S. Geological Survey Quadrangle Boysen, Wyoming, 7.5 Minute Series (topographic) – photo revised 1978. The lands were identified by location of brass cap survey monuments shown on Map No. 4.

C. Access

Access to the lands from Thermopolis or Shoshone, Wyoming is via U.S. Highway 20. The highway parallels the right bank of the Wind River through Wind River Canyon, crossing lot 4 of section 28.

Access to the Foust Homestead is by a one lane road which joins U.S. Highway 20 in the south portion of lot 4 and continues ENE for about 1/4 mile to the homestead. (See Photos 3 and 21.) This access road is the beginning of an old wagon trail, shown on the U.S.G.S. quadrangle as the Johnson Trail. (See Map No. 3.) The trail provided access south through Wind River Canyon prior to construction of tunnels for U.S. Highway 20 near the abandoned town of Boysen.

D. Improvements

(See Map No. 5 and Photos.)

The Fousts have occupied the improvements on lot 11 since acquisition from the original homestead entryman's widow in 1963. Documentary revenue stamps in the amount of $19.80 are affixed to the warranty deed conveying the land to the Fousts. According to the county clerk, Laramie County, Wyoming, tax on real estate transactions was assessed at $1.10 per $1,000, indicating the Fousts paid between $17,500 to $18,000 for the lands and improvements. Major improvements made by the Fousts since acquisition are a new double garage, a barn, a chicken house, and a cellar. (See photos.) The NE1/4SE1/4 of Section 28 is unimproved. Lot 5 of section 28 is also unimproved, except for a segment of the old Johnson Trail.

Mr. Foust stated that their house (Photos 13 and 14) and the garage/gambling hall (Photo 12) were built by Byron Smith. Mr. Foust also said there used to be another house on the land located near the river on lot 4. The Fousts have sold the portion of lot 4 west of U.S. Highway 20 and a new log house was being constructed on the land at the time of investigation. (See Photos 1 and 2.)

The spring development near AP5 of lot 11 and water pipeline were improvements made by Byron Smith and still service the homestead. The spring is of record in the Wyoming State Engineer's Office as Ollie's Spring under Permit No. U.W. 38117, having a priority date of appropriation of February 25, 1977.

V. ANALYSIS

All of the E1/2E1/2 of section 28 was open to entry when Smith filed his original SRHE application. (See LAND STATUS - History.) Also, all of the remaining portion of section 28 east of the Wind River and within Power Site

Reserve No. 115, the SE1/4NE1/4 in particular, was subject to entry. Entry was contingent upon the U.S.G.S.'s determination pursuant to Section 24 of the Federal Power Act of June 10, 1920, that the value of the land for power development purposes would not be injured or destroyed by location entry, or selection under the public land laws. Such a determination was made as to lots 4 and 5 in response to Smith's application C-051835 and the patent contains that restriction. The S1/2NE1/4 of section 28, which Smith actually occupied and improved, was equally available for entry when he filed applications C-050733 and C-051835.

All of Smith's improvements made for C-050733 and C-051835 are (or were) located within lot 4 and the S1/2 NE1/4 of section 28. Neither Smith nor the Fousts made any improvements within lot 5 or the NE1/4SE1/4 of section 28. (See maps and photos.) The case record for C-050733 clearly shows that Smith intended to file for the land in section 28 that contained the permanent spring. In his initial Petition for Designation/SRHE Application C-050733, Smith describes "...one small permanent spring with sufficient water supply for domestic purposes and for a few head of stock ..." Smith developed this spring and constructed a pipeline from the spring to his house located in the SW1/4NE1/4 of section 28. This water supply system remains in use by the Fousts today. The spring, as the 1980 resurvey shows, is located within the SE1/4NE1/4 of section 28, (near AP5 and AP6 of lot 11) and not within the NE1/4SE1/4 of section 28.

Why Smith only filed for 40 acres, the NE1/4SE1/4 of section 28, initially is subject to speculation. He may have all along thought that both the spring and the canyon bottom where he built his house and other improvements were within that subdivision. Also, the NE1/4SE1/4 of section 28 was outside of Power Site Reserve No. 115 so there would have been no delay in allowance of his entry in getting a Section 24 determination under the Federal Power

Act from U.S.G.S. Allowance of entry C-050733 also would have given Smith a preference right pursuant to Section 8 of the Stock-raising Homestead Act to enter additional contiguous lands.

Smith intended to enter the NE1/4SE1/4 of section 28 under the Stock-raising Homestead Act as stated in his original Petition for Designation C-050733. When the Cheyenne Land Office rejected his petition application C-050733, Smith appealed that decision and filed Supplemental Application C-050733 for the same land under RS 2289 five days later. The purpose of the supplemental application may have been to attempt to preserve a preference right of entry pending resolution of his appeal.

On July 8, 1930, the Acting Assistant Commissioner of the General Land Office wrote to the Register of the Cheyenne Land Office advising the NE1/4SE1/4 of section 28 was open to entry and returned application C-050733 for appropriate action. On July 9, 1930, the Cheyenne Land Office Acting Register allowed Smith's Supplemental Application C-050733 for the land under RS 2289 and not under the Stock-raising Homestead Act as Smith originally intended. The NE1/4SE1/4, along with lots 4 and 5 of section 28, were designated stockraising lands on February 21, 1931, effective March 16, 1931 (SR No. 767 – Letter 1408821), 9 months after C-050733 was allowed.

Since Smith's original entry for the NE1/4SE1/4 of section 28 was allowed under RS 2289, cultivation of the land was required. Smith filed joint final proof for C-050733 and C-051835 with the Cheyenne Land Office on September 3, 1935, showing only a small garden for cultivation claiming the rest of the land was too rocky for anything but grazing. Either Smith was advised by the Land Office that his proof did not show the requisite cultivation or he knew so. Accordingly, Smith filed an Application for Reduction of the Required Area of Cultivation on September 16, 1935, pursuant to the act of June 6, 1912; 37 Stat. 123. The GLO

did not act upon this application since the cultivation requirements on entries such as Smith's were eliminated by the Act of August 19, 1935 (49 Stat. 659).

On October 31, 1935, Max Caplan, Special Agent, Division of Investigations, DOI, Billings, Montana, investigated Smith's homesteads in response to a protest to Smith's final proof. The protest involved a third Stock-raising Homestead Entry made by Smith, C-055961, and was unrelated to the subject lands. Caplan's report corroborated statements made in Smith's final proof and recommended that entries C-050733 and C-051835 be allowed to proceed to patent. Caplan failed to note that none of Smith's homestead improvements were located on the NE1/4SE1/4 or on lot 5 as Smith claimed in his final proof.

The topography in this area of Wind River Canyon was certainly a factor contributing to Smith's error, Caplan's failure to note that error, and the long period the error remained undetected by BIA and the Fousts. The Canyon is over one half mile deep and about one and one half miles wide through section 28. (See Map No. 3 and Photos.) Topography is characterized by steep, rocky slopes and sheer cliffs. The partial survey of T. 6 N., R. 6 E., WRM, approved April 10, 1906, delineates the entire stretch of Wind River Canyon through the township as "unsurveyable." While later surveyed in 1926 and 1927, such delineation indicated the difficulty of surveying the lands and, implicitly, locating and identifying specific subdivisions.

The small canyon area where Smith built his main improvements is unique in that portion of section 28 east of the Wind River. The lands Smith intended to enter, the lands he entered, occupied and improved, and the lands the Fousts now occupy are the same lands. Those lands are all within the S1/2NE1/4of section 28.

VI. CONCLUSIONS

Clearly, Smith misdescribed the lands he entered under Homestead Entry C-050733 and SRHE C-051835. Patent No. 1087000 should have conveyed the SE1/4NE1/4 of section 28 and Patent No. 1087176 should have conveyed the SW1/4NE1/4 instead of lot 5 of section 28. Smith's error resulted from his failure to diligently identify and properly describe the lands he entered. Notwithstanding, the records show that Smith complied with the provisions of applicable laws to the satisfaction of officials of the Department of the Interior and was entitled to receive patents to lands he actually entered and improved.

I conclude that Smith's successors in interest to the above homesteads, Oliver and Marjorie Foust, acquired the lands and improvements believed to be located thereon in good faith. The Fousts too were not diligent in that they failed to ascertain that the house and other improvements were not located upon the lands they acquired from Evangeline Smith Meeks. However, the Fousts have demonstrated, and the facts of this matter show, that they are deserving of relief under Sec. 316 of FLPMA as a matter of equity and justice and should be granted that which was actually earned by the original patentee, Byron H. Smith.

VII. RECOMMENDATIONS

I recommend that Patent Correction Application C-050733/C-051835 filed by Oliver J. and Marjorie F. Foust on May 3, 1982, pursuant to Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1746, be approved. and that the errors in Patents Nos. 1087000 and 1087176 be corrected as follows:

1. Cancel the survey of section 28, T. 6 N., R. 6 E., WRM, accepted January 29, 1980, creating lots 9, 10, 11, and 12 within the S1/2NE1/4 of section 28.

2. Patent No. 1087000 – C-050733

a. Reconvey the NE1/4SE1/4 of section 28, T. 6 N., R. 6 E., WRM, surface and mineral estates, to the United States by warranty deed.

b. Upon acceptance of title by the United States, issue a decision canceling the patent, correcting the final certificate for C-050733 to read SE1/4NE1/4 of section 28, T. 6 N., R. 6 E., WRM, and authorizing issuance of a new and correct patent for Homestead Entry C-050733 conveying the SE1/4NE1/4 of section 28, T. 6 N., R. 6 E., WRM, surface and mineral estates, to Oliver J. Foust.

3. Patent No. 1087176 – C-051835

a. Reconvey lot 5 of section 28, T. 6 N., R. 6 E., WRM, surface estate only, to the United States by warranty deed.

b. Restore the SW1/4NE1/4 of section 28, T. 6 N., R. 6 E., WRM, now withdrawn by S.O. 5/10/1928 for PSR No. 115, to allow conveyance subject to Section 24 of the Federal Power Act.

c. Upon acceptance of title to lot 5 of section 28 by the United States, issue decision correcting the final certificate for C-051835 to read SW1/4NE1/4 instead of lot 5 of section 28, T. 6 N., R. 6 E., WRM, and authorizing issuance of a corrective patent conveying the SW1/4NE1/4 of section 28, T. 6 N., R. 6 E., WRM, surface estate only, to Oliver J. Foust. (See Map No. 6.)

Upon reconveyance of lot 5 and the NE1/4SE1/4 of section 28 to the United States, the lands would be restored to tribal ownership by Public Land Order.

VIII. NEPA COMPLIANCE

This action is categorically excluded from the require-

ments of the National Environmental Policy Act by 516 DM 6, Appendix 5.4(B)17.

REVIEW/DECISION

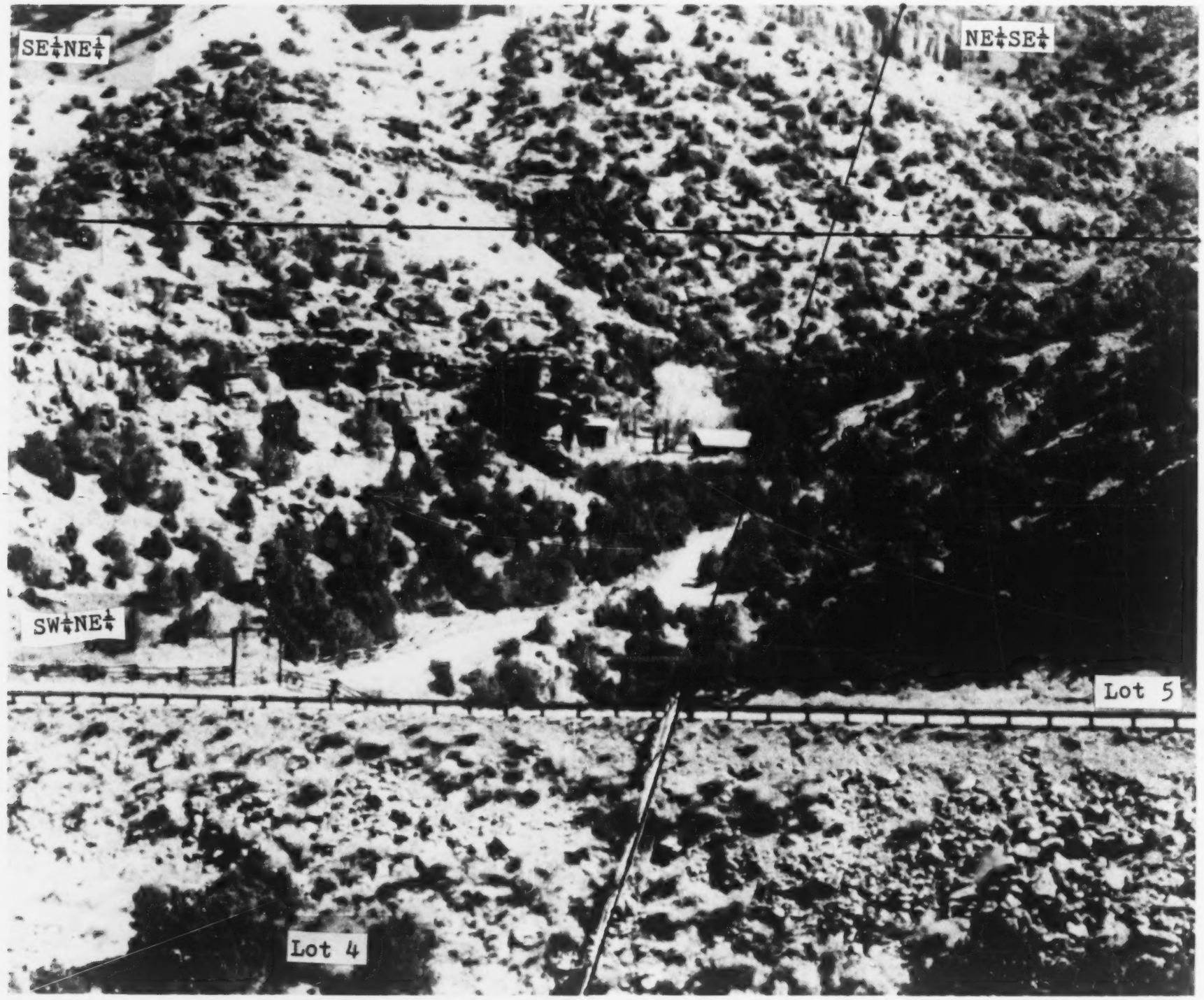
We have reviewed the recommendations in this Land Report and find that they are technically adequate and recommend they be approved as the Bureau's decision on this application.

/s/ James L. Edlefsen — 12/27/85
Chief, Branch of Land Resources — Date

/s/ L. Christian Vosler — 12-30-85
Deputy State Director, Lands and Renewable Resources — Date

APPENDIX C

Photo of the Homestead with the Boundary Lines depicted

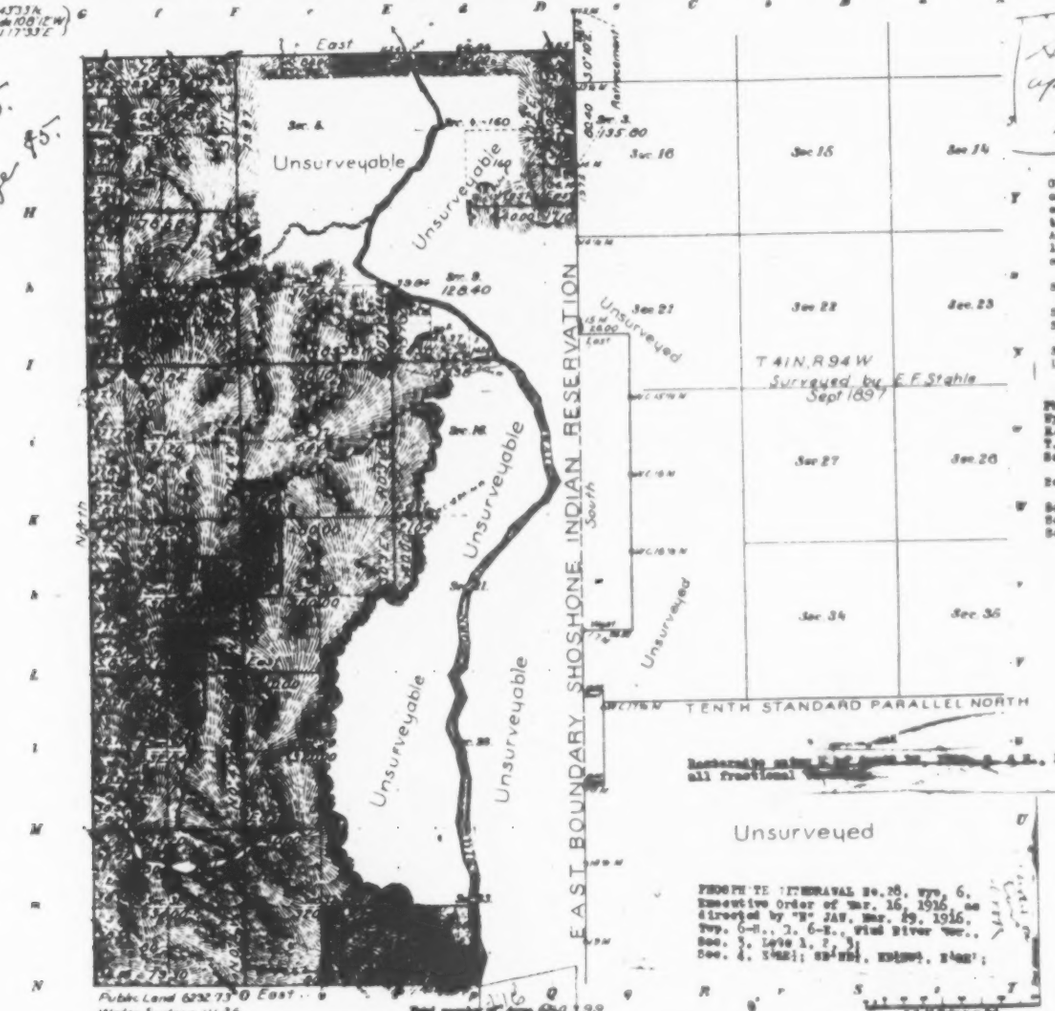

SE¼NE¼
NE¼SE¼
SW¼NE¼
Lot 5
Lot 4

APPENDIX D

1906 Survey of Section 28

(4-6758.)

Fractional Township No 6 North Range No 6 East of the Wind River Meridian Wyoming



Book 5. Page 95.

Area Sketch approved 3/20-17.8

GLO Letter "E" 1936282 of 11/25/42, Dept. Order of 8/28/42, restores to tribal ownership, under Act of 7/27/39, the following described Shoshone or Wind River Indian Lands: T. 6 N., R. 6 E., That part east of Big Horn River (partly unsurveyed). Land Use District #3a

GLO Letter "E" 1936282 of 11/25/42, Dept. Order of 8/28/42, restores to tribal ownership, under Act of 7/27/39, the following described Shoshone or Wind River Indian Lands: T. 6 N., R. 6 E., Sec. 31, Sec. 32, Land Use District #3?

GLO Letter "E" 1936282 of 11/25/42, Dept. Order of 8/28/42, restores to tribal ownership, under Act of 7/27/39, the following described Shoshone or Wind River Indian Lands: T. 6 N., R. 6 E., Sec. 21, that part east of Big Horn River, Secs. 22 and 27, Secs. 28 and 33, those parts east of Big Horn River Sec. 34, Land Use District #4a

GLO Letter "E" 1936282 of 11/25/42, Dept. Order of 8/28/42, restores to tribal ownership, under Act 7/27/39, the following described Shoshone or Wind River Indian Lands: T. 6 N., R. 6 E., Sec. 3, Secs. 4,5, & 8, those parts east of Big Horn River, Sec. 9, Sec. 10 Land Use District #3?

Phosphate Reserve No. 22. Wyo. No. 5. Ex. order Aug. 25, 1914. T. 6 N., R. 6 E., Sec. 5, Sec. 7, Sec. 17, Sec. 19, Sec. 29.

Phosphate Reserve No. 24. Wyo. No. 9. Ex. Order of May 3, 1916. Classified non-phosphate. Sec. May 8, 1916. T. 6 N. R. 6 E. Sec. 5.

Phosphate Reservation No. 14. Wyo. No. 4. Ex. order July 25, 1914. Classified nonphosphate. "E" Aug. 3, 1914. T. 6 N., R. 6 E. Sec. 5. Sec. 8.

Phosphate Sec. 11. Wyo. No. 2. 8 June 6, 1911. T. 6 N., R. 6 E. Sec. 5, all Sec. 6, all Sec. 7, lots 1,2, Sec. 8.

Reservation within T. 6 N., R. 6 E. all fractional

Unsurveyed

PHOSPHATE WITHDRAWAL No. 26, Wyo. 6. Executive Order of Mar. 16, 1916, as directed by "E" JAW, Mar. 29, 1916. Twp. 6-N., R. 6-E., Wind River Mer.. Sec. 5, Lots 1, 2, 3; Sec. 6, S½E¼; SE¼NE¼, E½SE¼.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, Washington, D. C. May 4, 1917. I hereby certify that this is a true copy of the plat of official survey of the lands to which it relates, on file in this office. Commissioner.

Survey Designation	By Whom Surveyed	Date of Contract	Approved (Date)	Area (Acres)
Original Survey	D. Leonard & Horton	302 May, 1905	Nov. 2, 1905	
Subdivisions	" "	" "	" " 18, 1905	
Corrections	" "	" "	" " " "	19 75
Meanders	" "	" "	" " 19 22	14 33 65
S.I. Reservation	Frank S. Wood	230 Dec. 16, 1906	6 00 00	April 4 & 1907
Remeasured & Subdivided	E. Bailey Drummond	Brown 307 May, 1905	1 00 40	Nov. 15, 1913

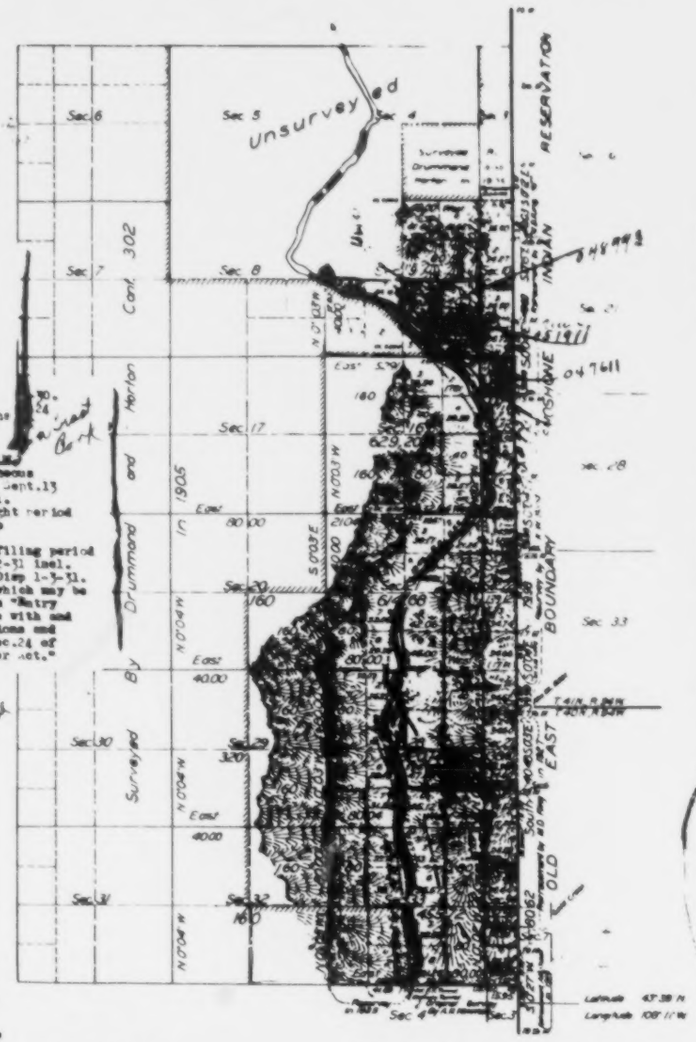
The above Plat of Township No. 6 North of Range No. 6 East of the Wind River Meridian Wyoming is hereby approved to the field notes of the survey thereof on file in this office and is hereby ordered approved. Surveyor General's Office, Cheyenne, Wyoming, April 12, 1907. S. Ephraim P. Hanson

BEST AVAILABLE COPY

APPENDIX E

1929 Survey of Section 28

TOWNSHIP Nº 6 NORTH, RANGE Nº 6 EAST OF THE WIND RIVER MERIDIAN, WYOMING



Filed October 5, 1928 at 9 a.m. after public notice

Temporary withdrawal, Power site, E March 7, 1910.
T. 6 N., R. 6 E.,
Sec. 4, [illegible] Wt.
Sec. 6, [illegible]
Sec. 8, [illegible], lot 1.
Sec. 9, lots 1,2,3, [illegible], unsurveyed portion of [illegible] Bighorn River, [illegible].
Sec. 15, [illegible] of Wt.
Sec. 16, Nl.
Sec. 21, all.
Sec. 22, [illegible].
Sec. 28, all.
Sec. 33, [illegible], unsurveyed portions of E½SE¼, and W½SE¼, east of Big Horn River.

Temporary, withdrawal, power site.

Soldiers' simultaneous pref right period Sept.13 to Oct.2,1930.incl.
Soldiers' Pref right period from Oct.1,1930 to Jany.2,1931,incl.
Gen simultaneous filing period Dec.15,1930, to 1-2-31 incl.
Land open to gen Disp 1-3-31.
All applications which may be filed must contain "Entry made in accordance with and subject to provisions and reservations of sec.24 of Federal Water Power Act."

"F" CHB Sept 12,1930:
Restoration under Sec 24 of Federal Water Power Act:
Lots 6, 7, 8, 9, 10, Sec 9
Lot 1 Sec 16 T 6 N., R 6 E.
"Entries made in exact accordance with and subject to provisions and reservations of Sec 24 of the Federal Water Power Act."
Soldiers' simultaneous filing period:
From 9/27/30 to 10/16/30, inclusive
Soldiers preference right period:
From Oct 17,1930 to Jan 15, 1931, incl.
General simultaneous filing period:
From Dec 27,1930, to Jan 15, 1931.
Land open to general [illegible] January 16,1931.

Commissioner's letter "F" CHB of Nov.22, 1928.

Department of the Interior
U. S. Land Office
Cheyenne, Wyoming, Nov. 17, 1928.

Notice is hereby given that the lands shown upon plat of survey of township 6 N., range 6 east, Wind River Meridian, approved November 12, 1927 and filed in this office on October 5, 1928, being within that portion of the Shoshone Indian reservation ceded under the act of March 3, 1905 (33 Stat 1016) may now be opened to homestead entry under the provisions of said Act.

Persons who make entries for any of these lands within two years after the opening shall pay therefor at the rate of $1.50 per acre; thereafter the lands will subject to entry at the [illegible] of $1.25 per acre, payment in all cases to be made as follows: 50¢ per acre at the time of making the entry and 25¢ per acre each year thereafter until the total purchase price is paid.

The following lands as constituted to conform to the plat of survey by the Secretary on May 10, 1928 [illegible] Interpretation No. 115; and included in power site reserve No. 115, pursuant to executive order of July 2, 1910, first withdrawn for temporary power site by the Secretary on February 10, 1910, and they are therefore not subject to appropriation except in case of valid existing claims initiated prior February 10, 1910, the date when they were first withdrawn for power site reserve:

Sec. 9, Lots 6 to 10, inclusive.
Sec. 14, All Fractional.
Sec. 16, Lots 1,2,3,4,5, Excpt.
Sec. 21, Lots 1 to 9, incl. [illegible].
Sec. 22, Lot 1.
Sec. 28, Lots 1 to 8, incl.
Sec. 33, Lots 3 to 8, incl.

Date of opening November 17, 1928
Simultaneous filing period for soldiers from November 24, 1928 to December 14, 1928, incl.
Preference right filing period for soldiers from December 15, 1928 to March 15, 1929.
Simultaneous filing period for general public from December 15, 1928 to March 15, 1929, incl.
Lands open to general disposition March 16, 1929.

"F" CHB Feb.21, 1929.
Restoration under sec.24 of Federal Water Power Act.

Lots 3,4,7, Sec.15, T.6 N.,R.6 E. W.R.M.
All applications must contain the following. "Entry made in accordance with and subject to the provisions and reservations of section 24 of the Federal Water Power Act."
about restoration confirmed by wire dated 2/26/29 [illegible]

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington, D.C., February 28, 1929.
The survey represented by the plat having been correctly executed in accordance with the requirements of law and the regulations of this office is hereby accepted.

Mean Magnetic Declination. [illegible]
Scale 40 Chains to an Inch
Area Surveyed, 3978.73 Acres.

Office of U.S. Supervisor of Surveys
Denver, Colorado, November 12, 1927
Township No. 6 N., Range No. 6 E. [illegible] Meridian, Wyoming
I hereby certify that the field notes of the survey of the above entitled township have been examined and approved.

LINES DESIGNATED	BY WHOM SURVEYED	NO	GROUP DATE	MILEAGE MLS	MILEAGE CHS	WHEN SURVEYED
Exterior	R.W.Bond and M.M.King	89	Jan. 21 1928	4	63.27	Aug. 13
Subdivisional	Alberty, Bond and King	"	"	10	32.31	Aug. 15
Meander	R.W.Alberty and R.W.Bond	"	"	8	72.20	"
Connecting	Alberty, Bond and King	"	"		58.87	"

25784 "F" CHB Aug.12,1931. Restoration under sec.24 Federal Water Power Act No.6048
Lot 1 Sec.28, T.6 N.R.6 E.W.R.M. Soldier's preference right period Sept.16,1931 to Dec.15, 1931. incl. Land open to General Disposition Dec.16, 1931.
All applications which may be filed for said land must contain the following.
"Entry made in accordance with and subject to provisions and reservations of Sec.24 of the Federal Water Power Act."

25841 "F" CHB Aug.17,1931. Lots 3,4, Sec. 3, T.6 N.R.6E. withdrawn from all forms of entry or disposal under the public land laws for storage, diverting power, subject to valid rights & claims initiated prior to [illegible]

BEST AVAILABLE COPY

APPENDIX F

STOCK-RAISING HOMESTEAD
FINAL PROOF
TESTIMONY OF WITNESS
DEPARTMENT OF THE INTERIOR

U.S. Land Office, Cheyenne, Wyoming Serial No. 050733
Additional Entry Serial No. 051835

NOTE: – The officer before whom this proof is made will see that all answers are complete and responsive to the questions, and that the answers bring out the pertinent facts showing the entryman's compliance, or noncompliance, with the laws under which the land was entered. Neither the claimant nor the other witness may be present while the testimony of this witness is being taken.

QUESTION 1. What is your full name, age, and post-office address?

ANSWER. Name, Arthur W. Crowley; age, 44 years; P.O. address, Thermopolis, Wyoming

QUESTION 2. Are you the same person who was mentioned in the published notice as Art Crowley (Officer before whom proof is taken will fill in the name as published.)

ANSWER. Yes

QUESTION 3. How long have you known the claimant in this case and the NE1/4SE1/4 Sec. 23 and Lots 4, 5, Section 28, Township 6 N., Range 6 E., Wind River Meridian, the land embraced in Homestead Entries No. 050733 & 051835, made at the Cheyenne, Wyoming, Land Office?

ANSWER. I have known claimant 8 years, the land 20 years.

QUESTION 4. (a) Is entryman married? (b) Of whom does entryman's family consist?

ANSWER. (a) Yes (b) wife and self

QUESTION 5. Is said tract within the limits of an incorporated town, or used in any way for trade or business?

ANSWER. No.

QUESTION 6. If this proof is for an additional entry, state whether the entryman has resided upon such additional entry or upon his original entry.

ANSWER. Original

QUESTION 7. (a) At what date did entryman establish actual residence on said homestead? (b) Is there now a habitable house upon the land?

ANSWER. (a) 1930 (b) Yes

QUESTION 8. Has entryman, or entryman's family, maintained a residence elsewhere than on this land at any time since residence was thus established?

ANSWER. No

QUESTION 9. Have entryman and family ever been absent from the homestead since thus establishing residence thereon? If so, state when, for how long, and for what reason.

ANSWER. Only for short times. Believe he has lived there all the time.

QUESTION 10. Considering each residence year as beginning at the date on which actual residence was established, state the number of months during each residence year that entryman actually resided upon the land.

ANSWER. First year, 10 months; Second year, 10 months; Third year, 10 months; Fourth year, 10 months; Fifth year, all of 1935 until now.

QUESTION 11. With regard to the land for which this proof is offered, state: (a) the kind of soil, (b) contour of the surface, as "level", "rolling", "rough", "hilly", "mountainous", etc., (c) number of acres which have been cultivated, (d) number of acres not cultivated which might be profitably cultivated, (e) number of acres containing trees of any kind, (f) number of feet of saw timber.

ANSWER. (a) rocky (b) rough and mountainous (c) 1/2 acre (d) none (e) none (f) none

QUESTION 12. State the number of acres cultivated and kind of crop planted, each year, and state to what extent the land has been used for grazing.

ANSWER. Garden spot is all cultivated. The rest is too rocky for anything but grazing.

QUESTION 13. (a) Describe fully and in detail the amount and kind of improvements on the land, stating when same were made and giving the cost of each item, and if proof is offered upon an additional entry under the stock-raising law state definitely which of such improvements are actually upon the additional entry and when they were placed there.

ANSWER.

Year Constructed: 1932
Location of Improvements: NE1/4 SE1/4
Character of Improvements: House
Cost of Materials: 1000.00
Cost of Labor: 1000.00
Total Cost: 2000.00
Year Constructed: 1932
Location of Improvements: NE1/4 SE1/4
Character of Improvements: Garage for two cars
Cost of Materials: 50.00
Cost of Labor: 50.00
Total Cost: 100.00
Year Constructed: 1932
Location of Improvements: NE1/4 SE1/4
Character of Improvements: Other Buildings
Cost of Materials: 25.00
Cost of Labor: 25.00
Total Cost: 50.00
Year Constructed: 1931
Location of Improvements: Lots 4, 5
Character of Improvements: Fence and buildings
Cost of Materials: 125.00
Cost of Labor: 40.00
Total Cost: 165.00

Total No. acres cultivated 1/2 acres. Cost of improvements on original entry $2150.00. Cost of improvements on stock-raising entry $165.00.

QUESTION 13 (b) If any portion of the land has been cultivated, reclaimed by irrigation, cleared of trees or brush, seeded to cultivated grasses, or in any manner han-

dled so as to increase its productiveness, give full details and cost of such work, stating how many acres were so treated and upon which entry said work was done.

ANSWER. About 1/2 acre of garden is all that is cultivated. It probably cost $100.00 to make it.

QUESTION 14. Are there any indications of coal, salines, or minerals of any kind on the land? If so, describe what they are.

ANSWER. No.

QUESTION 15. Have you any knowledge or information that claimant has sold or contracted to sell, optioned, mortgaged, or agreed to option or mortgage this land? If so, give full details as to whom, for what purpose and in what amount.

ANSWER. No.

QUESTION 16. Have you personal knowledge, from your own observation, that claimant and his family (if any) actually resided upon and cultivated this land each year in accordance with your above testimony?

ANSWER. Yes.

QUESTION 17. How many times each year have you seen this land, and the claimant and his family residing thereon; and what other personal knowledge have you upon which your answers are based?

ANSWER. Probably four times each year, I have been to their house.

QUESTION 18. Are you interested in this claim, or related to the claimant? If so, how?

ANSWER. No.

QUESTION 19. Has either the claimant or the other witness been present while you were giving your above testimony?

ANSWER. No.

QUESTION 20. Have you any actual knowledge of any statement made by the claimant or the other witness in their testimony in connection with this proof?

ANSWER. No.

/s/ Arthur W. Crowley

(Sign plainly, with full Christian name.)

☛ Note. – Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. See section 125, United States Criminal Code (below.)

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that I verily believe deponent to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office in Thermopolis, County of Hot Springs, State of Wyoming, within the Cheyenne, Wyoming, land district, this 30th day of August, 1933.

/s/ J. Ellis Lant
U.S. Commissioner
(Official Designation of Officer.)

UNITED STATES CRIMINAL CODE.

Sec. 125. Whoever, having taken an oath before a competent tribunal officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

APPENDIX G

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Max Caplan, Special Agent /s/ Approved: Robert W. Dyer
Acting Special Agent in Charge,
Department of Interior

FAVORABLE REPORT

The Commissioner
General Land Office
Washington, D.C.

Through
Director of Investigations
Department of the Interior

Byron H. Smith of Thermopolis, Wyoming, made Homestead Entry, Sec. 2289, and ASRHE 050733-051835-055961, now Serial No. , on July 9, 1930, and March 16, 1931, for NE1/4SE1/4, Sec. 28, and Lots 4, 5, Sec. 28, T. 6 N., R. 6 E., Cheyenne, Wyoming, Land District, upon which proof was made August 30, 1935, was protested, and final certificate, No. not, issued pending field investigation and report.

1. Date of examination: October 21, 1935.

2. Character of land: Original entry extremely rough and rocky, containing scattered scrub cedars not commercially valuable and two small springs sufficient for domestic use. Additional entry level to rough and rocky, with small area suitable for cultivation.

3. Residence: Available evidence is to the effect that temporary residence was established about July 1930, and that from March 1, 1932, up to and including the date of investigation continuous residence has been maintained on the land by claimant and his family.

4. Cultivation and improvements: Approximately 1/8 of an acre cultivated as a garden on the original entry and about 3 acres cultivated as a garden and for forage crops on Lot 4 of the additional entry. There is on the original entry a stone and log house, double garage, storeroom, and

frame bath house, having a reasonable value of $2,330.00. On the additional entry there is a 3-room frame house, valued at $250.00; frame chicken house and frame coal house, valued at $50.00; and stockraising improvements consisting of a storage cellar, dug well, shed, and fencing, having a total reasonable value of $330.00.

5. Other material facts. Only approximately 1/8 of an acre has been cultivated on the original entry, the land in the entry not being adaptable for cultivation, and application for reduction in area of cultivation has been filed. However, applicant is apparently entitled to the benefits of the Act of August 19, 1935, which eliminates the necessity for cultivation.

Protest against the entry of Byron H. Smith was submitted to the Commissioner of the General Land Office by Herman A. Parker of Shoshoni, Wyoming, under date of August 1935, but this protest had reference to claimant's additional entry in T. 40 N., R. 92 W., and no adverse action against the additional entry is warranted at this time in view of claimant's residence on the original entry. It would appear that the protest should be dismissed and the entry be allowed to proceed to patent.

MC:WB
Billings, Montana
November 18, 1935

/s/ Max Caplan
Special Agent,
Department of the Interior

CONFIDENTIAL

APPENDIX H

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

REPLY PLEASE REFER TO
55724 "F" CBB

: Promulgating restoration
: under section 24 of the
: Federal water power act
: No. 541.

Register,

Cheyenne, Wyoming.

Sir:

By Executive order dated July 2, 1910, certain lands within your district were withdrawn and included in power site reserve No. 115.

The Federal Power commission has determined that lots 4 and 5, Sec. 28, T. 6 N., R. 6 E., W. R. M., would not be injured or destroyed for the purpose of power development by entry, location or selection thereof provided the same be made subject to the terms and conditions of section 24 of the Federal water power act.

In view of the foregoing, it is hereby ordered pursuant to public resolution No. 85, approved June 12, 1930, that the land described subject to valid rights and the provisions of existing withdrawals shall be opened only to entry under the homestead or desert land laws by ex-service men under the terms and conditions of said resolution and regulations issued thereunder for a period of 91 days beginning with the 35th day from and after the date of this order and thereafter any of the land remaining unentered will be subject to appropriation under any applicable public land law by the general public.

Subsequent to this order and prior to the date of restoration to general disposition as herein provided for,

no rights may be acquired to said land by settlement in advance of entry, or otherwise, except strictly in accordance herewith.

You will note upon all applications which may be filed for said lands:

> "Entry made in accordance with and subject to provisions and reservations of Sec. 24 of the Federal Water Power Act".

Very respectfully,
Acting Commissioner

Approved:
Assistant Secretary.

8-25-omo

BLM Parcel Restoration No. 541 State: Wyoming
BLM Serial 55724 F Stream: Big Horn River
Date approved 8/29/30 Stream index: 6 HE

Resulting from: DA-70 Wyoming Issued) X Determined) Date 2/19/30

No injury: X Without stipulations With stipulations (see below)

For mining only

Stipulations:

Affecting: PSR No. 115

63.98 Acres

Land restored subject to Section 24 of Federal Power Act:
T. 6 N., R. 6 E., W.R.M. sec. 28, lots 4 and 5.

APPENDIX I

APPLICATION TO CORRECT HOMESTEAD PATENT

OLIVER J. FOUST and MARJORIE E. FOUST, husband and wife, whose present address is: Box 768, Thermopolis, Hot Springs County, Wyoming, and who have no telephone, hereby apply to have an error corrected from a patent which was issued to Byron H. Smith on November 24, 1936 pursuant to the Homestead Act of Congress for a homestead located in the Wind River Canyon, Hot Springs County, Wyoming.

Authority

This Application is submitted under the statutory authority of 43 U.S.C. 1746.

Original Conveyance

Lots 4, 5 and the NE1/4SE1/4 Section 28, Township 6 North, Range 6 East, W.R.M. were originally granted to Byron H. Smith pursuant to the Homestead Acts; certified copies of said patents are attached hereto as Exhibits "A" and "B".

Record Holders

Attached hereto as Exhibit "C" is a photostatic copy of the Warranty Deed conveying Lots 4, 5 and the NE1/4SE1/4 Section 28, Township 6 North, Range 6 East, W.R.M. to Oliver J. Foust and Marjorie E. Foust, successors in title to Byron H. Smith.

History of Title

1. The area involved is located at the southern end of the Wind River Canyon near the tunnels. It is within the original boundaries of the Wind River Indian Reservation as created by the Treaty of 1868.

2. The area was ceded from the Wind River Reservation on March 3, 1905. (33 Stat. 1016)

3. The area was subsequently opened to settlement by Executive Order on June 2, 1906.

4. A placer mining claim for gold was filed on January 16, 1924 on the land by Oscar Simonson. This claim

was never perfected although assessment work was done up until 1928.

5. A placer location for building stone was filed on March 2, 1925 by various locators. Assessment work appears until 1926.

6. The patents (Exhibits A & B) followed in 1936 under the Homestead Acts of 1862. The lands were described according to the survey data available to the General Land Office as of 1930.

7. Subsequently, the United States restored to the Reservation those lands not opened to homestead patent, including the unclaimed lands in the Wind River Canyon.

8. The patentee, Byron Smith, lived on the land in question until his death in 1958. Through Probate, title passed to his widow Evangeline Smith.

9. On June 19, 1963, title was conveyed to the property to your petitioners, Oliver Foust and Marjorie Foust. (Exhibit C).

10. The Fousts have lived on the old homestead continuously since 1963. They are now elderly and semi retired.

11. On January 29, 1980, a resurvey of the steeply carved Wind River Canyon was completed by the BLM. The resurvey shows that the land believed to have been homesteaded by Byron Smith is not properly described in the homestead patent. Upon learning of this change, the BIA and the Tribes have demanded that the Fousts leave the old homestead and pay trespass fees. (Correspondence file is attached as Exhibit D).

Nature of Error

The Fousts live in the Wind River Canyon on what has traditionally been thought to be Lots 4 and 5, described above. The resurvey as conducted on January 29, 1980 only recently advised the Fousts that their present home with all of its outbuildings is no longer located on Lot 5 as previously thought, but on what is now Lot 11, Section 28, Township 6 North, Range 6 East, W.R.M., Hot Springs County, Wyoming. A misdescription of the original homestead appeared on the face of the patent.

The Fousts' home and outbuildings are located in a small canyon arising out of the Wind River, almost perpendicular to the Wind River Canyon. For approximately one mile either north or south of the Fousts' present home, there are no suitable locations for a homestead site because of the extremely rough terrain and cliffs which make up that area. Attached hereto as Exhibit "E" is a topographic map of the area showing the terrain. A photographic Exhibit "F" likewise shows the terrain.

The best evidence of the error is the layout of the land. The only site upon which a home and the various improvements could have reasonably been constructed is the present site. All of the surrounding area and especially the topography of Lot 5 is extremely rough and steep, consisting mostly of cliffs which are inaccessible for man and beast. Certainly not within the intent of a homestead.

The error was made because, until recently, no reliable survey had been made of the area. It defies common sense that a man would intentionally build a home and construct improvements without intending to live in them.

Correction of Error

The Fousts hereby propose to deed back to the United States Lot 5, Section 28, Township 6 North, Range 6 East, W.R.M., Wyoming in exchange for what is now Lots 9, 10 and 11, Section 28, Township 6 North, Range 6 East, W.R.M., Wyoming, which contain almost identical acreage. The new patent should be issued to Oliver J. Foust and Marjorie E. Foust conveying Lots 9, 11 and 12, Section 28, Township 6 North, Range 6 East, W.R.M., Wyoming.

DATED this 30 day of April, 1982.

Respectfully submitted,
/s/ Oliver J. Foust
/s/ Marjorie E. Foust
/s/ William L. Miller
Central Wyoming Law Associates,P.
105-107 South 6th East
Riverton, Wyoming 82501
Attorney for Applicants

Encl: Exhibit

A – Patent No. 88-940
B – Patent No. 88-941
C – Warranty Deed
D – Correspondence file
E – Topographical map
F – Photographs
G – Abstract of Title
H – Affidavit of Oliver J. Foust
I – Affidavit of Bonnie Bleak

APPENDIX J

AFFIDAVIT

STATE OF WYOMING)
) ss:
County of Hot Springs)

OLIVER J. FOUST being first duly sworn, deposes and states:

1. My wife, Marjorie E. Foust, and I are applying to the BLM to correct the Homestead Patent originally issued to Byron H. Smith for Lots 4 and 5, Section 28 in Township 6 North, Range 6 East, Wind River Meridian, Wyoming.

2. On June 19, 1963, my wife and I purchased Lots 4 and .5, and the NE1/4SE1/4 of Section 28, Township 6 North, Range 6 East, from Evangeline Smith who was the wife of Byron H. Smith the man who homesteaded the property where we presently reside.

3. My wife and I presently reside in a home located in the Wind River Canyon in Hot Springs County, Wyoming in a small valley which lies almost perpendicular to the Wind River Canyon.

4. We purchased the home where we presently live from Evangeline Smith in 1963 as set forth above. At the time of the purchase, Mrs. Smith told us that our present home and its outbuildings lie in Lot 5. We were further informed that that area had been homestead by Mrs. Smith's husband and that is how they had acquired title to that property.

5. Our home and outbuildings lie in a small valley which is surrounded on three sides by extremely rough terrain. For approximately one mile either way from our home, there are no locations in the Wind River Canyon that are suitable for building a home because of the extremely rough terrain and steep cliffs which run directly into the Wind River.

6. From time to time I have remodeled the home in which I presently live and in various places I have found notations that were made by Byron H. Smith indicating that he built the home in 1932.

7. At the time my wife and I purchased the property where we presently live, we were informed that the buildings were located on the building as described in the Warranty Deed that was given to us. I contacted Mr. Lewis Toth in Thermopolis, Wyoming and conferred with him regarding a survey of the area. Mr. Toth was a surveyor and had surveyed the highway through the Wind River Canyon at various times. Mr. Toth informed me at the time of the purchase of the home that it was very difficult to survey in the Wind River Canyon and that so far as he knew, there had been no accurate survey made of the area which I was purchasing.

8. From 1963 until 1980 my wife and I lived undisturbed in our present home. In 1980, the BLM conducted a resurvey of the Wind River Canyon at the request of the BIA. A helicopter was used to conduct the survey and after that survey was completed, I was informed by the BIA and the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation that my present home was located on Tribal land and was not located on the land to which I had a Deed. We attempted to negotiate our differences with the Tribes to no avail and presently they are threatening to take my home away from me and charge me in excess of $23,000.00 for trespass.

9. I have spoken with several people who grew up in the area, including Bonnie Bleak and her brother Jim White. Both of these people grew up in this area and their father, Bob White, helped Mr. Byron Smith construct the home in which I live, which is originally the homestead cabin. From Mr. White and Ms. Bleak, I learned that everyone in the area has always thought that the home and outbuildings where I presently live was the homestead of Byron Smith and that is where he lived and constructed his improvements to qualify for a homestead.

10. The only explanation that anyone can give me as

to why now it would appear that the buildings are not on the land described in the original homestead is that Byron Smith who was known as "Barney" must have made a mistake in describing the land that he was homesteading.

11. The land, as described in the Deed that I received, especially Lot 5, is extremely rough terrain consisting of steep mountain sides and cliffs. There are no locations on said Lot upon which a house could be constructed. There would be no conceivable reason why anyone would attempt to homestead such rough terrain.

12. The only conclusion I can reach regarding the reason why the house where I am presently located is not located on the property described in the Deed I received from Evangeline Smith and the homestead that Byron H. Smith acquired is because he made a mistake in applying for the land.

13. Until the survey was completed in 1980, I always believed that my house was located on Lot 5, Section 28, Township 6 North, Range 6 East, Wind River Meridian, Hot Springs County, Wyoming. All of the people I have spoken with who are familiar with the area, were of the same impression. Traditionally, all of the people who grew up in the area and have lived in the area have considered the little valley in which I presently live as the "old Barney Smith homestead".

FURTHER AFFIANT SAITH NOT.

OLIVER J. FOUST

Subscribed and sworn to before me this 30 day of April, 1982.

WITNESS my hand and official seal.

/s/ Jack R. Huml
Notary Pubic
My commission expires: 11/10/84

APPENDIX K

AFFIDAVIT

STATE OF WYOMING)
) ss:
County of Hot Springs)

BONNIE BLEAK being first duly sworn, depose and states:

1. I presently live in the Wind River Canyon near the property where Oliver and Marjorie Foust presently live. I am presently 57years old and I was born and raised in the Wind River Canyon.

2. When I was a young girl, I can remember my father helping Byron H. Smith, or Barney Smith as we knew him, construct Barney's homestead cabin. That homestead cabin is the house Oliver Faust presently lives in.

3. Until Oliver recently informed me that the home he lives in does not lie within the land described in Barney's Homestead Patent, I hade (sic) thought that the building Oliver lives in was located, on Barney Smith's homestead property.

4. The terrain surrounding the home of Oliver Foust is very rough and the only suitable place to live in the area is that area where Oliver has his home and the various outbuildings from that home.

5. Until this matter with the resurvey arose, there was never any question in my mind or of any of the people who have lived here for any length of time that the home where Oliver lives was located on Barney Smith's homestead.

6. If the present Deeds do not show the land where Oliver's home and buildings are located as that being described in Barney's Homestead Deed, then Barney or someone made a mistake because no one has ever considered that Barney homesteaded any area other than where the buildings of Oliver Foust are presently located.

FURTHER AFFIANT SAITH NOT.

/s/ BONNIE BLEAK

Subscribed and sworn to before me this 30 day of April, 1982.

WITNESS my hand and official seal.

/s/ Jack R. Huml
Notary Public
My commission expires: 11/10/84

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

SHOSHONE AND ARAPAHOE TRIBES	)	
	)	
v.	)	No. C82-0515
	)	
OLIVER AND MARJORIE FOUST	)	

STIPULATION

In order to permit the United States Department of the Interior to rule on defendants' application to correct homestead patent and for any administrative appeal of that ruling to be completed before the issues raised in this court are litigated, and, if possible, to avoid the necessity of litigation, the parties stipulate:

1. This action, No. C82-0515, shall be dismissed without prejudice, each party bearing his own costs.

2. This action shall not be recommenced before the disposition of defendants' application to correct homestead patent has been completed through administrative appeal unless it is necessary for plaintiffs to recommence the action to avoid the operation of 28 U.S.C. 2415 or other statutes of limitation.

Respectfully submitted,

/s/ John Hursh
John Hursh
CENTRAL WYOMING LAW ASSOCIATES, P.C.
105-107 South 6th East
Riverton, Wyoming 82501
Attorney for the Defendants

/s/ Harry R. Sachse
Harry R. Sachse
SONOSKY, CHAMBERS, SACHSE & GUIDO

1050 - 31st Street, N.W.
Washington, D.C. 20007
Attorney for the Shoshone
Indian Tribe

/s/ Robert S. Pelcyger
Robert S. Pelcyger
FREDERICKS & PELCYGER
Suite 240-1007 Pearl Street
Boulder, Colorado 80302
Attorney for the Arapahoe
Indian Tribe

/s/ William J. Thomsen
William J. Thomsen
204 E 22nd Street
Cheyenne, Wyoming 82001
Local Counsel for the
Shoshone Indian Tribe and the
Arapahoe Indian Tribe

APPENDIX M

April 16, 1982

Memorandum

To: Area Director, Indian Affairs, Billings
Attn: Rights Protection

From: Field Solicitor, Billings

Subject: Alleged Unauthorized Use of Tribal Trust Property
Township 6 North, Range 6 East, W.R.M., Lot 11
Oliver J. Foust

Attached is a copy of an April 3, 1982, letter from William L. Miller, attorney, Riverton, Wyoming, counsel for Mr. and Mrs. Oliver Foust. The letter is in response to our March 15, 1982, letter to the Fousts.

I have discussed the matter with local Bureau of Land Management employees (note, different state offices involved) and it would appear that there may be some merit to the mistake argument of the Fousts. If an error in the description were made, and can be proven, then, pursuant to 43 CFR 1821.6-1 through 1821.6-6, the patent can be amended.

Accordingly, we request that our March 15, 1982, letter and the April 8, 1982, response be referred to the Tribe and tribal attorneys for their comments.

If you have any questions concerning this matter, please feel free to call upon our office.

The file is returned.

Richard K. Aldrich
For the Field Solicitor

Enclosure

cc:
Regional Solicitor,Denver, CO
Superintendent, Wind River Agency, Fort Washakie, WY
(w/cy April 8, 1982, ltr. to ea.)

RKAldrich:cp

AFFIDAVIT OF MAILING

I, John R. Hursh, the attorney for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the FEBRUARY 19, 1992, I deposited in the United States Post Office located at Riverton, Wyoming, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

John R. Hursh
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105-107 South 6th East
Riverton, Wyoming 82501
(307) 856-4157
Attorney for Respondent

STATE OF WYOMING)
: ss
County of Fremont)

SUBSCRIBED AND SWORN to before me this 19 day of Feb, 1992.

Notary Public
My commission expires:

ROBIN MONTGOMERY-NOTARY PUBLIC
STATE OF WYOMING COUNTY OF FREMONT
MY COMMISSION EXPIRES MAR. 20, 1993

CERTIFICATE OF SERVICE

I, John R. Hursh, the attorney for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the February 19, 1992, I served copies of this Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorneys of record:

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